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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID CONTRERAS, as Trustee, etc.,

Plaintiff and Respondent,

v.

FLORENCIO CONTRERAS III,

Defendant and Appellant.

G056710

(Super. Ct. No. 30-2017-00941294)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Bentley Law and Justin C. Bentley for Defendant and Appellant.

Cabanday Law Group and Orlando F. Cabanday for Plaintiff and Respondent.

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This is an appeal from an order denying a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. (See Code Civ. Proc., § 425.16 (§ 425.16).) The challenged complaint alleges only two causes of action: (1) slander of title based on the recording of a lis pendens, and (2) conversion of personal property. The defendant filed an anti-SLAPP motion, and while that motion was pending, the plaintiff dismissed his cause of action for slander of title without prejudice.

The trial court denied the anti-SLAPP motion on the slander of title claim as moot, but found the defendant was entitled to attorney fees and costs because his motion on that claim would have been granted had the claim not been dismissed. The court also denied the anti-SLAPP motion on the remaining conversion cause of action because that claim did not arise from protected activity. For the reasons explained below, we affirm the court's order.

I.

FACTS

The following facts are taken from the pleadings, the declarations, and other evidence submitted on the special motion to strike.

A trustor created a trust to hold title to his personal and real property. When the trustor died, one of his sons, plaintiff David Contreras, became the trust's successor trustee.¹

David and his brother, defendant Florencio Contreras III, are the trust's cobeneficiaries. In the years since their father's death, they have had several ongoing disagreements about the trust property.

Florencio filed a probate petition seeking to remove David as trustee. He also filed and recorded a lis pendens against a house owned by the trust, which prompted

¹ Because the parties share the same surname, we refer to them by their first names to avoid confusion. We mean no disrespect.

another dispute between the brothers over whether Florencio was attempting to interfere with David's efforts to sell the house. Florencio ultimately agreed to withdraw the lis pendens. Shortly thereafter, the trust sold the house, but the brothers could not agree on how to distribute the funds from the sale.

David, acting in his capacity as trustee, filed a complaint against Florencio and his attorney, Andrew T. Cooledge. In his first cause of action for slander of title, David accused Florencio and Cooledge of recording a false lis pendens against the house. In his second cause of action for conversion, David accused Florencio of diverting trust assets for his own use.

Before Florencio appeared in the case, Cooledge filed an anti-SLAPP motion asserting the slander of title cause of action arose from protected activity — the recording of the lis pendens. The trial court agreed and dismissed Cooledge with prejudice.

Florencio then filed his own anti-SLAPP motion seeking a dismissal of both causes of action, plus attorney fees and costs. (See § 425.16, subd. (c)(1) [awarding fees and costs to prevailing defendant on anti-SLAPP motion].) Florencio argued David's slander of title cause of action arose from protected activity — the recording of the lis pendens — and David filed the conversion cause of action in retaliation for Florencio's probate petition.

Apparently taking a cue from the trial court's ruling on Cooledge's anti-SLAPP motion, David dismissed his slander of title cause of action without prejudice while Florencio's anti-SLAPP motion was pending. In his opposition to the anti-SLAPP motion, David argued the motion should be denied because it was moot on the dismissed slander of title cause of action, and because conversion of personal property is not protected activity.

After hearing oral argument, the trial court found David's dismissal of the slander of title cause of action mooted Florencio's anti-SLAPP motion on that cause of

action. The court further concluded, however, that it would have granted Florencio's motion on that cause of action because the filing of a *lis pendens* is protected activity and David failed to demonstrate a probability of prevailing on that claim. The court therefore concluded Florencio could file a motion for attorney fees. On the conversion cause of action, the court denied Florencio's anti-SLAPP motion, finding he failed to demonstrate the cause of action arose from protected activity. Florencio filed a timely notice of appeal.

II.

DISCUSSION

A. *The Anti-SLAPP Statute*

In 1992, the Legislature enacted section 425.16 to address “what are commonly known as SLAPP suits (strategic lawsuits against public participation) — litigation of a harassing nature, brought to challenge the exercise of protected free speech rights.” (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) The statute authorizes a special motion to strike meritless claims early in the litigation if the claims “aris[e] from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.” (§ 425.16, subd. (b)(1).)

When a party files a special motion to strike, the trial court must engage in a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We review a trial court's order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) We "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) "However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff[s]."" (*Flatley, supra*, at p. 326.)

B. *The First Cause of Action for Slander of Title*

As noted above, the trial court denied as moot Florencio's anti-SLAPP motion on the first cause of action for slander of title, which David dismissed before the motion was heard. However, the court found it *would have* granted Florencio's motion on that claim and thus permitted him to file a motion for attorney fees. Florencio challenges these rulings, asserting the court should have ruled on the merits of his anti-SLAPP motion and the court's order amounted to an improper advisory opinion. We disagree.

A "trial court lack[s] the jurisdiction to rule on the merits of [an anti-SLAPP] motion [if] prior to the ruling the plaintiff had voluntarily dismissed the case." (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 872-873 (*Ellis*).) This is true even if the dismissal is without prejudice. (See *id.* at p. 878.) Because David dismissed his slander of title cause of action well before the hearing on Florencio's anti-SLAPP motion, the anti-SLAPP motion was rendered moot on that particular claim, and the court lacked the jurisdiction to reach the merits of Florencio's motion. Simply put, a court cannot strike a cause of action that already has been dismissed.

Despite that dismissal, the trial court retained jurisdiction to rule on Florencio's request for attorney fees under section 425.16, subdivision (c)(1). (*Ellis, supra*, 178 Cal.App.4th at p. 879 ["when plaintiffs dismiss their cases before the trial court rules on the anti-SLAPP motion, the trial court continues to have jurisdiction over the case for purposes of deciding if the plaintiffs are responsible for attorney fees and

costs, but not to rule on the anti-SLAPP motion”]; see *Roe v. Halbig* (2018)

29 Cal.App.5th 286, 304 [“defendant may qualify as the ‘prevailing party’ under the anti-SLAPP statute even where the SLAPP suit has been voluntarily dismissed prior to a judicial ruling on the anti-SLAPP motion to strike”].) Indeed, the court’s evaluation of whether Florencio “would have prevailed on [his] motion to strike [was] an *essential prerequisite* to an award of attorney fees and costs” under subdivision (c)(1).

(*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1457, italics added.)

Thus, the portion of the court’s ruling on the merits of Florencio’s motion was not an improper “advisory opinion” as Florencio suggests; it was a proper exercise of the court’s jurisdiction in ruling on Florencio’s fee request.

Asking us to depart from *Ellis*, Florencio cites to a line of cases prohibiting a plaintiff from *amending* the challenged complaint to avoid an anti-SLAPP motion, and argues by extension a plaintiff should not be able to avoid an anti-SLAPP motion by *dismissing* a challenged cause of action. Dismissing a claim is not the same as amending it, however, so the same policy considerations are not at play here. “Allowing an amendment ‘once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16’s quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading.’” (*Mobile Medical Services, etc. v. Rajaram* (2015) 241 Cal.App.4th 164, 171.) The same policy argument does not apply to a dismissal, which removes the challenged cause of action from the complaint altogether. Allowing a plaintiff to dismiss a claim while an anti-SLAPP motion is pending is thus wholly consistent with section 425.16’s dismissal remedy.

The fact that David’s dismissal was without prejudice does not alter our analysis. True, David could refile his slander of title cause of action in the future, but

Florencio could recover his attorney fees and costs *again* under section 425.16, subdivision (c)(1). Thus, we see no reason to depart from the well-reasoned *Ellis* decision.

C. *The Second Cause of Action for Conversion*

Florencio next challenges the trial court's denial of his anti-SLAPP motion on the conversion cause of action. He contends the conversion cause of action incorporated by reference the complaint's preceding allegations concerning the lis pendens and thus was a "mixed" claim alleging both protected and unprotected activity. According to Florencio, the court therefore should have granted in part his anti-SLAPP motion on the conversion cause of action by striking out all allegations in the complaint about the lis pendens or any real property. We do not find the argument persuasive.

A claim is only subject to a motion to strike if it "aris[es] from" protected activity. (§ 425.16, subd. (b)(1).) Section 425.16, subdivision (e), defines protected activity to include any statement made in a judicial proceeding or in connection with an issue under consideration by a judicial body. (§ 425.16, subd. (e)(1), (2).) The recording of a lis pendens is "[u]nquestionably" protected activity (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 471; see *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1050), but conversion of personal property is not necessarily protected activity.

As noted above, the moving party on an anti-SLAPP motion bears the burden of showing the challenged claim "aris[es] from" protected activity. To meet this burden, "the speech or petitioning activity *itself* [must be] the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.) In evaluating whether that requirement is met, courts consider "the *principal thrust* or *gravamen* of a plaintiff's cause of action" and determine whether the

acts underlying that cause of action were acts in furtherance of the right of petition or free speech. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520.)

Applying these authorities here, Florencio did not meet his burden of establishing the conversion cause of action “aris[es] from” protected activity. In the “general allegations” section of the complaint, David alleges that Florencio took funds from the trust’s bank account and stole from the trust’s collections of antique dolls, guns, jewelry, and electronics. In the conversion cause of action, David alleges Florencio and the unnamed Doe defendants intentionally “converted trust assets (personal preoperty [sic])” and “diverted assets, money and other property of Plaintiff for their own personal purposes,” and David suffered losses and damages. None of those allegations arise from Florencio’s exercise of his rights of free speech or petition or seek to hold Florencio liable for the exercise of those rights. Instead, the principal thrust or gravamen of David’s conversion cause of action is theft of personal property, which standing alone is not protected activity. (Cf. *MMM Holdings, Inc. v. Reich* (2018) 21 Cal.App.5th 167 [conversion claim based on attorney’s refusal to return documents his client took from plaintiffs was subject to anti-SLAPP motion because attorney’s conduct was protected by litigation privilege].)

Ignoring that fatal defect in his anti-SLAPP motion, Florencio argues the conversion cause of action incorporates by reference the complaint’s background allegations and the slander of title cause of action about the recording of the lis pendens, which was protected activity. Florencio therefore reasons the trial court should have granted his motion in part by striking any and all allegations in the complaint about the filing of the lis pendens or any real property. We disagree.

The complaint’s general allegations referencing the lis pendens are not subject to the anti-SLAPP statute because the conversion cause of action does not seek to impose liability on Florencio for recording the lis pendens. “Allegations of protected

activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394.)

The same is true for the incorporation by reference of the slander of title cause of action. Again, the conversion cause of action does not seek to impose liability on Florencio for recording the lis pendens. And because the slander of title cause of action was dismissed, it was “eliminated from the cause[] of action into which it had been incorporated” and thus cannot “taint” the conversion cause of action. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931.)

We therefore conclude Florencio did not meet his burden of showing the challenged conversion claim arose from protected activity. Accordingly, we need not decide whether David established a probability of prevailing on that claim. (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 43-44.)

III.

DISPOSITION

The order is affirmed. David shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.